# No. 15,583

# United States Court of Appeals

## For the Ninth Circuit

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ALEX E. WILSON,
*Appellant,*

vs.

FRED G. STEVENOT, Trustee of Coastal Plywood & Timber Company, a corporation, Debtor,
*Appellee.*

**Appeal from the United States District Court for the Northern District of California, Northern Division.**

## APPELLANT'S CLOSING BRIEF.

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### STATEMENT OF THE CASE.

#### I. THE FACTS OF THIS CASE ARE NOT IN DISPUTE.

In the final analysis the facts of this case are quite simple. The evidence establishes the following salient facts without question:

(1) That Appellant was requested by the Trustee and his attorney, Sterling Carr, to find a purchaser for the assets of this estate;

(2) That these services were rendered by Appellant with the knowledge and acquiesence of the Trus-

tee and with the active assistance, encouragement and cooperation of the Trustee;

(3) That through the efforts of Appellant in negotiating the resales and thereby guaranteering the investment of the Sugarman interests, an offer was made possible which was submitted to the Trustee and accepted by him and the Court;

(4) That the Sugarman interests were procured by Appellant as the purchaser of these assets, and that the assets of this estate were sold to them;

(5) That these assets were finally sold after direct negotiations between Sugarman Lumber Company and the Trustee from which Appellant was excluded, and that the Trustee thereby prevented any possibility that Appellant might have had to obtain his compensation from the purchaser;

(6) That the sale of these assets was of great benefit to this bankrupt estate.

The transcript show these facts contrary to any contention that may be made by the Trustee in his brief. Some of these facts are shown below by short excerpts from the Transcript, and some are discussed in more detail later in this brief.

Mr. Carr told Appellant that he would be paid (Tr. 273):

> "A. He, (Mr. Carr) said, Stevenot is quite a decent fellow, and he won't do that in the final analysis; he is not going to cheat you out of your brokerage if you sell it. Stevenot is all right, he is a good business man, *and he will pay you*".

Petitioner procured the Sugarmans as the purchaser of these assets (Tr. 419):

> "Q. Mr. Hildebrand. But Mr. Wilson and Mr. Steinberg were the people that brought the Sugarmans to you, weren't they?
>
> A. Mr. Stevenot. I am telling you, I don't deny that".

The Sugarman interests procured by Petitioner and the Sugarman Lumber Company are one and the same persons (Tr. 176-177):

> "Q. Mr. McMurchie. It, (Sugarman Lumber Company) was formed for the purpose of taking over these assets?
>
> A. Mr. Steinberg. That is right, taking over these assets.
>
> Q. So that the original offer of July 22nd and the final purchasers are one and the same persons?
>
> A. That is correct".

Appellant was excluded from the negotiations between Sugarman Lumber Company and the Trustee (Tr. 407):

> "Q. Mr. Olson. And how long did these negotiations continue (with Sugarman Lumber Company)?
>
> A. For several weeks.
>
> Q. Mr. Olson. Did Mr. Alex Wilson participate in these negotiations?
>
> A. Mr. Stevenot. He did not".

Again at page 320 of the transcript:

> "A. Mr. Wilson. . . . After that, when the negotiations were going on they never called me into these meetings".

This sale was of great benefit to the estate (Tr. 388):

> "Q. The Court. You are willing to stipulate that it was a beneficial transaction to the estate?
>
> A. Mr. Olson. I will stipulate, your Honor, that the second plan of reorganization which encompassed this sale was most beneficial to the estate".

The findings of the Court are also quite clear in regard to the beneficial nature of Appellant's services. The findings of the Court in this regard appear in the Transcript at page 97:

> 12. Said sale of said assets and the efforts of Petitioner in interesting N. Sugarman, B. Margolis and others in the purchase of said assets and in introducing these interested parties to Trustee were of real benefit to the bankrupt estate.
>
> 13. Petitioner was instrumental in negotiating the resales by Sugarman Lumber Company, and Sugar Lumber Company would not have offered to purchase the assets of Debtor as aforesaid unless these resales had been negotiated by Petitioner.

Appellant contends that these services rendered at the special instance and request of the Trustee, freely accepted by the Trustee, and of great benefit to the bankrupt estate create an obligation to pay for these services which is recognized both at law and equity and in proceedings under the bankruptcy act. This obligation to pay for these services is even more apparent in this case in view of the long negotiations and many contacts between Appellant and the Trustee, all acquiesced in by the Trustee, and in view of

the prior conduct of the Trustee in the payment of a commission to Appellant in the Nielson transaction under almost identical circumstances, both of which created an even stronger and more equitable claim for compensation in this proceeding. This equitable claim arises under the law of implied in fact contract resulting from the conduct of the Trustee, and under the law of *quasi* contract imposed by the law irrespective of the intent of the parties when beneficial services are freely accepted as they were by the Trustee in this case. Appellant has demonstrated in his Opening Brief that the Bankruptcy Act authorizes the payment of compensation to Appellant for his services in this matter, and the applicable cases authorize the allowance of compensation to a real estate broker under almost identical circumstances.

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## II. APPELLEE'S INTERPRETATION OF THE FACTS IS DISPUTED.

The brief of Appellee does not seriously dispute any of the basic facts listed above, but merely attempts to minimize the effect of these facts. Similarly Appellee does not dispute Appellant's basic equitable claim for compensation, but attempts to raise numerous technical objections in an effort to avoid this equitable claim of Appellant.

Needless to say, Appellant does not agree with the Statement of Facts appearing in the Trustee's brief.

Appellant's analysis of the pertinent facts in this case has been presented in his Opening Brief. How-

ever, Appellant feels that some of the more apparent strained constructions and misconstructions of the evidence appearing in the brief of Appellee should receive some comment.

**A. Trustee's Version of the Nielson Transaction Is Not in Accord With the Evidence.**

Trustee goes to great lengths in attempting to distinguish the payment of a commission to Appellant for the sale of cutting contracts in the Nielson transaction under circumstances almost identical with the circumstances present in this case from the sale of the balance of the assets of Debtor which is now pending before this Court.

On page 13 of his brief Trustee attempts to import that in a letter of August 9, 1952, Mr. Clarence Nielson agreed to pay Appellant a commission and agreed to require the Debtor to pay Appellant his costs. A quotation from this letter which was Trustee's Exhibit "D" shows that no such construction can be placed on his letter. The letter stated as follows:

> "It is understood and agreed that Nielson is to pay Wilson nothing for his work in obtaining the said contracts for him. Wilson's costs in this matter shall be paid by Coastal Plywood Company. The $1.00 per thousand that the said Wilson is to receive represents his commission in aiding the said Nielson in selling the timber on the said land when and if the said Nielson secures the said lands and timber".

It is obvious from this letter that the commission mentioned in this letter has absolutely nothing to do with the purchase of the cutting contracts from Coastal,

but refers only to the resale of this timber when and if Mr. Nielson secured these cutting contracts. When and if Mr. Nielson purchased these contracts and then resold them, Mr. Nielson, as the seller on such a resale, expected to pay the commission specified. However, it is obvious from the letter that Mr. Nielson wanted it clearly understood that he was not to be responsible for any commission on the sale of the contracts to him by Coastal, and that on that sale Mr. Wilson was to obtain his commission from the seller, Coastal Plywood Company.

The evidence is also clear that the Trustee asked Mr. Wilson to sell these cutting contracts in July, 1952. Mr. Wilson worked with various potential purchasers, including Mr. Clarence Nielson, until the Nielson offer of October, 1952, which was accepted by the Trustee. This is a period of three months that Appellant spent in attempting to find a purchaser for these contracts in accord with the request by the Trustee. There is no evidence that Appellant had a purchaser at the time he was requested to sell or that Appellant at that time had anything except numerous potential purchasers which is the stock in trade of any real estate broker.

Prior to the acceptance of this offer by Mr. Nielson, the Trustee had a conference in an attempt to induce the purchaser, Mr. Nielson, to increase his offer for the cutting contracts so that Debtor could realize the sum of $100,000.00 net on these properties. Mr. Nielson refused to pay more than $100,000.00 for these contracts, and would not pay a commission in addition

to the $100,000.00 purchase price because he was the purchaser. It should be noted that the Trustee during this conference was interested in getting more money for these contracts, and not particularly in who paid the commission. The following testimony appears at pages 398-399 of the Transcript:

> "A. Well, immediately I called his attention to the fact that his offer contained an item of $5,000.00 commission to be paid to Wilson, and I protested it saying that I wanted a hundred thousand net for the property, for the cutting contracts.
>
> Mr. Nielson reacted by telling me that he would only pay a hundred thousand dollars and he insisted that $5,000.00 of it be paid to Mr. Wilson.
>
> We had considerable discussion over the matter and did not reach a conclusion, and Mr. Nielson left my office.
>
> I tried at that time to get Mr. Nielson to eliminate the question of the commission and pay me the hundred thousand dollars. He refused. I repeated that several times."

Apparently the Trustee attempted by negotiations with the purchaser, Mr. Nielson, to avoid the payment of a commission by either party to the real estate broker on the sale of these cutting contracts; a device that he was more successful in accomplishing in the subsequent sale to Sugarman Lumber Company. However, Mr. Nielson knew that if this sale was consummated a commission would have to be paid, and he made it clear that he would not be responsible for this commission. In the final analysis when the purchaser

refused to pay the commission, Coastal Plywood and Timber Company did pay Mr. Wilson his real estate commission of $5,000.00 for the sale of these cutting contracts. As in the transaction now before this Court, when the purchaser has refused to pay a commission, it is the seller who must pay if he desires to take advantage of the offer which has been procured by the broker.

The order of the Court approving the sale of these cutting contracts clearly authorizes the Trustee to pay a real estate broker's commission to A. W. Wilson (Tr. 18), and a commission was paid by the check of Debtor marked "Commission—Sale of Cutting Contracts, $5,000.00". (Tr. 147.)

**B. The Trustee Requested That Appellant Sell the Assets of This Estate, and Encouraged and Cooperated With Him in His Effort.**

Many portions of the testimony reported in the Transcript are direct evidence that the Trustee did request and authorize Appellant to sell the assets of Debtor corporation. (Tr. 141; Tr. 251-254; Tr. 149; Tr. 270-272; Tr. 306.) In addition to this direct testimony, the transcript contains many instances of conduct on the part of the Trustee which are consistent only with the giving of authority to Appellant to sell these assets.

The record in this matter contains many references to conversations in regard to the payment of a real estate broker's commission most of which took place prior to July, 1953. It would seem apparent that conversations in regard to real estate broker's commis-

sions arise only when the sale of real estate is being discussed and the broker authorized to proceed with the sale. The fact that conversations in regard to the payment of a commission were had shows in itself that without any doubt the sale of the assets by Mr. Wilson was authorized and discussed many times between Mr. Wilson and Mr. Stevenot, and show that Mr. Stevenot was in fact vitally interested both before and after July, 1953 in obtaining a purchaser for these assets.

The evidence also shows that Appellant wrote at least five letters to the Trustee in addition to many phone calls and conversations in the Trustee's office in regard to the sale of these assets and the prospective purchasers that Appellant had contacted. (Tr. 263-270; Petitioner's Exhibits 8, 9, 10, 11 and 12.) All of these letters and most of these conversations were prior to July, 1953, and also show that the Trustee had requested and was most interested in the sale of these assets.

There is some mention in Trustee's Brief of his letter of July 22, 1953, to Appellant stating for the first time in writing that no commission would be paid Appellant. The Trustee neglects to note that this letter was written on the same date that the Trustee had received an offer from J. J. Sugarman Company for the purchase of the assets of this estate; an offer that had been procured by Appellant. (Tr. 373.) The Trustee also neglects to state that he and his attorneys had been informed in a discussion five days previously that the Sugarman interests would not pay a com-

mission to any one in regard to this transaction. (Tr. 179-180.) If ever a letter was written too late it is this letter of July 22, 1953 from the Trustee. It is obvious that the Trustee's letter was written only after he had the offer procured by Appellant in his hands, and with full knowledge that the buyers would not pay any commission to Appellant. Certainly if the Trustee under these circumstances intended to deal with the purchaser procured for him by Appellant at his request, then he assumed responsibility for the payment of his compensation.

**C. Appellant Was the Procuring Cause of the Sale to Sugarman Lumber Company, and Was the Means of Bringing His Principal and the Purchaser Together.**

The duty of a real estate agent in order to entitle himself to compensation is well stated in the case of *Berman v. Palmetto Apartments Corp.,* 153 Fed. (2d) 192, a case involving a real estate broker's commission in a reorganization proceedings. In that case the court stated as follows:

> "It is generally held that a selling agent is entitled to compensation if his agency is the procuring cause of the sale, and when his communications with the purchaser have been the means of bringing the purchaser and his principal together, his right to compensation is complete. (Citing many cases.)"

In this case Appellant was the procuring cause of the sale, and was the means of bringing together the Debtor company as his principal, and Sugarman Lumber Company as purchaser. The Trustee admitted

from the stand that Mr. Wilson and Mr. Steinberg were the people that brought the Sugarmans to the Trustee. (Tr. 419.) Mr. Steinberg stated that the offer was made possible by the efforts of Mr. Wilson, and through Mr. Wilson's introduction of Mr. Holm into the picture. (Tr. 216-217.) The Sugarmans insisted that before an offer could be made to buy the assets of Debtor corporation that they be assured that this property could be resold. (Tr. 220.) This, Appellant, through Mr. Holm, was able to do, and thereby Appellant enabled this offer and eventual sale to be made.

**D. Appellant Diligently Served Only the Trustee in His Effort to Find a Purchaser for These Assets as Requested by the Trustee.**

Throughout this transaction Appellant worked for and in the best interests of the Trustee and the Debtor Estate. Many other brokers had apparently attempted to sell these assets, but were unsuccessful in doing so. (Tr. 357.) The Trustee testified that he told all these brokers that he would not pay a brokerage commission because he would not further impoverish the situation that the equity stockholders had in the property by imposing a real estate brokerage commission on them. (Tr. 359.) It is difficult to conceive how the equity stockholders could have possibly been in any more impoverished condition than to have their corporation in the midst of a reorganization proceedings with the R.F.C. threatening to foreclose. It was obvious that the only alternative was the sale of the property, and the discouragement of all attempts to sell the property by statements to brokers that they must

obtain their commission from the buyer played directly into the hands of R.F.C. and Bank of America. If the Trustee truly had the interests of the stockholders at heart he would have been most willing to pay a brokerage commission and thereby to encourage the obtaining of a sale which would pay all creditors and stockholders in full, such as was finally procured by Appellant.

It is clear that the principal factor which enabled Appellant to obtain for his principal an offer from the Sugarman interests was his assistance in negotiating the resale of these assets by Sugarman to various other persons. The Sugarman interests stated that the only way they could make a deal for the purchase of the assets of Coastal Plywood was to have commitments for the resale of the timber to compensate for their original investment. (Petitioner's Exhibit No. 5, Tr. 172.) Mr. Wilson was instrumental in arranging these resales. (Tr. 172; Tr. 216.) Mr. Wilson had previously suggested a piecemeal sale of these assets to the Trustee because there was a lot of timber to sell in one block. (Tr. 252.) However, the Trustee insisted that all of the property must be sold in one package because he didn't want to go before the Court for confirmation of the sale as each portion was sold. (Tr. 252; Tr. 282.) The assistance given by Mr. Wilson in arranging these resales did not constitute a conflict of interest, but showed devoted and diligent efforts to obtain an offer from the Sugarman interests for the purchase of the assets of his client, Coastal Plywood and Timber Co. (Tr. 281.)

It appears that when Mr. Steinberg was convinced that the Trustee would not voluntarily pay the commission due to Appellant on this sale, Mr. Steinberg agreed to compensate Mr. Wilson for his assistance in completing the resale of these assets. (Tr. 163; Tr. 165.) Mr. Steinberg was a joint venturer with the Sugarman interests and expected to realize a large profit on these resales. (Tr. 180.) This is entirely a separate situation and concerned only with these resales, and not with the sale to Sugarman Lumber Company by Coastal Plywood Company. It was never intended to be in lieu of a commission from Coastal Plywood Company. (Tr. 289; Tr. 213.) However, Mr. Steinberg has not been paid, and Mr. Wilson has received absolutely nothing from any one for his successful efforts in this matter. (Tr. 214-215.)

It is conceded by all parties concerned that Mr. Fred Holm, introduced to Mr. Steinberg by Mr. Wilson, was the primary force in bringing together the parties on this resale. (Tr. 175-176.) Mr. Wilson has agreed to compensate Mr. Holm for his expense in contacting the various parties, and in completing these resales which made it possible for Mr. Wilson to obtain an offer acceptable to his seller. (Tr. 281.) Again, no conflict of interest appears.

**E. Trustee Prevented Any Possibility of Appellant Being Compensated by the Buyer.**

The evidence is clear that Appellant was not included in the final negotiations for the sale of these assets. (Tr. 320; Tr. 407.) Appellee cites no evidence to the contrary. The facts are that Appellant did

bring the buyer and seller together, and that thereafter seller did negotiate with the buyer outside the presence of Appellant, without advising Appellant of the time and place of these meetings, and without inviting Appellant to attend.

If Trustee actually intended that Appellant obtain his compensation from the buyer as he has testified, then he would have refused to deal with Sugarman Lumber Company without Appellant being present or without some provision being made in his negotiations for the payment of compensation to Appellant. If the Trustee really thought that Appellant was the agent for Sugarman Lumber Company, then the final details of this sale should have been negotiated through, or at least in the presence of this agent.

Trustee did none of these things. Knowing that this purchaser had been procured by Appellant, the Trustee dealt directly with this purchaser outside of the presence of this broker, without discussion of his commission, and with the obvious purpose of leaving Appellant high and dry on the question of compensation. The Trustee had also attempted by negotiation with Mr. Clarence Nielson to eliminate the payment of a commission to Appellant by either party in that transaction. Mr. Nielson being an ethical man and realizing that brokers must be paid for their services, the Trustee was unsuccessful in his efforts to avoid compensation to Appellant in that case. It is submitted that in equity this Court should not allow a Trustee by this questionable procedure to avoid the clear obligation of this estate to pay reasonable com-

pensation for the services rendered by Appellant. It is important that this Court protect the bankrupt estate from excessive charges; it is equally important that officers of the Court in these bankruptcy proceedings be held to at least a standard of conduct required of other businessmen.

The Trustee cannot seriously contend that he thought Sugarman Lumber Company was paying Appellant for his services in this matter. The Trustee knew full well from the offers he had received and from his conversations with Sugarman Lumber Company that they refused to pay a commission to any one in this transaction. (Tr. 179-180; Tr. 159.)

**F. Statements by Sterling Carr That Appellant Would Be Paid for His Services Are Undisputed.**

The evidence is clear and undisputed that Mr. Sterling Carr, attorney for the Trustee, throughout this transaction continually assured Appellant that the Trustee was a decent fellow and would not cheat him in his brokerages; that the Trustee was a good businessman; and that if Appellant sold these assets he would be paid. (Tr. 273; Tr. 287). The Trustee told Appellant to try and get his compensation from the buyer, and Appellant said that he would try to do so but he didn't think it was possible. The attorney for the Trustee told him not to worry too much about what the Trustee said because the Trustee would not cheat him and that if he sold the assets he would be paid. When the offer procured by Appellant was received by the Trustee, the Trustee thereafter negotiated directly with these purchasers without any

attempt to protect Appellant in his commission, and sold these assets to the purchasers procured by Appellant without any provision for compensating Appellant. These circumstances must appeal to a Court of equity and the facts of this case should induce this Court in justice and good conscience to compensate Appellant reasonably for the benefit received by this estate through his efforts. The technical objections raised by the Trustee cannot overcome this equitable claim of Appellant.

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## ARGUMENT.

### I. FAILURE TO OBTAIN LEAVE TO APPEAL IS NOT JURISDICTIONAL, BUT ONLY A PROCEDURAL IRREGULARITY WHICH MAY BE DISREGARDED BY THE COURT.

It is a legitimate inference from a reading of Section 250 and Section 24 of the Bankruptcy Act and Rule 33 of Rules of U. S. Court of Appeals, Ninth Circuit, that all appeals from decisions in bankruptcy proceedings involving sums in excess of $500.00 may be appealed as of right to the Court of Appeals. Section 250 of the Bankruptcy Act provides that appeals may be taken from orders refusing to make allowances of compensation in the manner and within the time provided for appeals by the Act. Section 250 reads as follows:

> Section 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, *in the manner and within*

> *the time provided for appeals by this Act,* be taken to and allowed by the Circuit Court of Appeals independently of other appeals in the proceedings, and shall be summarily heard upon the original papers.

This language of Section 250 would appear to indicate that Sections 24 and 25, the only other sections in the Bankruptcy Act concerning appeals, control the *manner and time* for taking an appeal.

It is well settled that under Section 24 of the 1938 Act the distinction between permissive appeals and matters appealable as of right were largely removed, and that all appeals from proceedings in bankruptcy are as of right, as distinguished from an appeal upon allowance by the Appellate Court, except in cases where the order or decree appealed from involves less than $500.00. It is stated in 2 *Colliers on Bankruptcy,* 730, Section 22.11, as follows:

> "It is evident that under the present Act the general rule is that an appeal from an order or decree entered in a 'proceeding in bankruptcy', either interlocutory or final, may be taken as of right, without any necessity for the securing of allowance from the Circuit Court of Appeals. The sole statutory exception to this rule is where the order, decree or judgment appealed from involves less than $500.00; in such case the appeal lies only upon an allowance by the Appellate Court".

Rule 33, of U. S. Court of Appeals, Ninth Circuit, entitled Bankruptcy Appeals, in discussing petitions

to this Court for leave to appeal refers to Section 24 (a) of the Bankruptcy Act and to decrees or judgments involving less than $500.00. No mention is made therein of a requirement for a petition for leave to appeal under Section 250 of the Bankruptcy Act.

Appellant was familiar with these sections and authorities prior to the filing of his Notice of Appeal in the District Court, and a conscientious reading of Section 250 and Section 24 of the Act and Rule 33 of the U. S. Court of Appeals, Ninth Circuit, would not indicate a need to check the case interpretation of the statutory language of Section 250.

However, as Appellee points out in his brief, the Supreme Court has ruled in the case of *Dickenson Industrial Site v. Cowan,* 309 U.S. 382, 60 S. Ct. 595, 84 L. Ed. 819, that the proper procedure in the appeal from compensation orders under Section 250 is to petition the Court of Appeals for leave to appeal. Subsequent cases have made it clear, however, that the failure to file such application in the Court of Appeals for leave to appeal is not a jurisdictional defect, but only a procedural irregularity that may be disregarded by the Court in its discretion. In 6 *Colliers on Bankruptcy* (14th Ed.) 4596, it is stated as follows:

> "But the defect is not considered jurisdictional in the sense that it deprives the Appellate Court of all power to allow the appeal. The Court has discretion, where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice, if the circum-

stances indicate that an unmerited hardship would otherwise be visited upon Appellant".

In the case of *Reconstruction Finance Corp. v. Prudence Securities, Advisory Group,* 311 U.S. 579, 61 S. Ct. 331, 85 L. Ed. 364, the Supreme Court, speaking through Justice Dougles, the same Justice that had written the Court's opinion in the *Dickenson case (supra),* held that the failure to file application for leave to appeal is not jurisdictional in the sense that it deprives the Court of power to allow the appeal, and that the Court has discretion where the scope of review is not affected to disregard such an irregularity in the interests of substantial justice. The Court stated that where the effect of the procedural irregularity was not substantial, where the scope of review was not altered, and where there was no question of the good faith of petitioner, of dilatory tactics, or of frivolous appeals, it would be extremely hard to hold that petitioner was deprived of his right to a decision on the merits of his appeal.

In this case the Notice of Appeal, Statement of Points, and Designation of Record were promptly filed in the District Court; the Transcript of Record has been promptly printed; and all briefs have been filed without request for extension of time. This case involves a request for compensation for services rendered by a real estate broker which, based on the normal brokerage commission, involves a substantial sum of money. This case also presents substantial questions of law, of equity and of public policy as evidenced by the extensive briefs filed herein which

should be considered by this Court on their merits. This appeal has been prosecuted in good faith without any dilatory tactics, and is not a frivolous appeal. It is submitted that the Court should therefore exercise its discretion and consider this case on its merits by disregarding the procedural irregularity or by treating the Notice of Appeal in the District Court as an informal petition for leave to appeal which should be granted.

There are many cases which authorize the exercise of such discretion by the Court of Appeals in the circumstances presented by this case. In the case of *Ross v. Drybrough,* 152 Fed. (2d) 427, the Court of Appeals for the Second Circuit held that where Appellant Ross had filed a Notice of Appeal in the District Court within the time prescribed by Section 25 (a) it appeared from the Supreme Court's decision in *Reconstruction Finance v. Prudence Securities,* 311 U.S. 579, 61 S. Ct. 311, 85 L. Ed. 364, that in point of jurisdiction, *stricti juris,* that served as an application either to compel the Trustee to appeal, or, as an alternative, for leave to appeal in his name.

In the case of *Cohen v. Casey,* 152 Fed. (2d) 610, the Court of Appeals for the First Circuit felt that its exercise of discretion was not warranted by any circumstances appearing in the record of that case, but the Court stated that under the *Reconstruction Finance* case it had the power to allow the appeal by treating the Notice of Appeal filed by Appellant in the court below as an informal substitute for an application to the Court for leave to appeal.

In addition to the *Cohen* case the only other cases cited by Appellee for the proposition that appeals taken by filing Notice of Appeal should be dismissed for failure to make application for allowance of the appeal are *In re Country Club Bldg. Corp.,* 128 Fed. (2d) 36; *In re Donahoe's Inc.,* 110 Fed. (2d) 813 and *In re Von Kozlow Realty Co.,* 116 Fed. (2d) 673. (Appellee's Brief, page 34.) However, the case of *In re Country Club Bldg. Corp.,* 182 Fed. (2d) 36, involves a situation where neither a Petition nor a Notice of Appeal was filed, and the other two cases were decided prior to the Supreme Court decision in *Reconstruction Finance v. Prudence Securities, (supra).*

The case of *In re Country Club Building Corporation,* 128 Fed. (2d) 36, cited by Appellee, involved a situation where the Appellant neglected to file either a Notice of Appeal or a Petition for Allowance to Appeal within the 30 day period. The Court held that the filing of one of these documents was jurisdictional. In a later case of *In re Granada Apartments,* 155 Fed. (2d) 882, decided by the same Circuit Court, it was clearly held that the failure to procure permission to appeal is not jurisdictional where a Notice of Appeal has been filed. In the case of *In re Granada Apartments,* 155 Fed. (2d) 882, the Court of Appeals for the Seventh Circuit stated as follows where a Notice of Appeal had been filed by Appellant:

> "However, if it be considered that the appeal, to be effective, should have been by permission of the Court, such defect is not a jurisdictional one in the sense that it deprives this Court of

> power to allow the appeal, and we now allow it. The appeal was perfected within the time required by either method, and the scope of the review is in no manner affected. See *Reconstruction Finance Corporation v. Prudence Securities Advisory Group,* 311 U.S. 579, 61 S. Ct. 331, 85 L. Ed. 364".

It is clear that the case of *In re Country Club Building Corp.,* 128 Fed. (2d) 36, cited by Appellee is not in point in this proceeding where a Notice of Appeal was filed in the District Court within the required time.

The case of *In re Donahoe's Estate,* 110 Fed. (2d) 813, is also cited by Appellee. This case was decided by the Court on March 19, 1940, and prior to the Supreme Court decision in the *Reconstruction Finance Corporation* case which is dated January 6, 1941. The case is therefore not at all applicable because the subsequent Supreme Court decision in the *Reconstruction Finance Corporation* case held that failure to petition for allowance to appeal was not jurisdictional, but merely a procedural irregularity. Similarly, the case of *In re Von Kozlow Realty Co.,* 116 Fed. (2d) 673, the final case cited by Appellee, was decided on January 7, 1941, the day after the decision in the *Reconstruction Finance* case *(supra),* and on a petition for rehearing the Court in the *Von Kozlow* case *(supra)* acknowledge that by virtue of the Supreme Court decision in the *Reconstruction Finance* case the Court now had discretion to treat the filing of the Notice of Appeal in the District Court as sufficient.

In the case of *Brown v. Hammer,* 203 Fed. (2d) 239, an appeal was allowed by the Fourth Circuit in spite of the procedural irregularity of failing to petition the Court of Appeals for allowance of an appeal. In that case the Court of Appeals stated as follows:

> "Appeal was taken within the time allowed by 11 U.S.C.A. Section 48, from the order making allowances to Edens and Hammer. Motion to dismiss the appeal has been made on the ground that the exclusive method of review was petition to this Court for allowance of appeal under 11 U.S.C.A. Section 650. We think, however, that under the circumstances here appearing we should ignore the irregularity in the interest of substantial justice and should treat the appeal taken as a petition filed for the allowance of an appeal. *Reconstruction Finance Corp. v. Prudence Securities Advisory Group,* 311 U.S. 579, 61 S. Ct. 331, 85 L. Ed. 364".

The Court of Appeals for the Ninth Circuit has also held that the failure to petition for allowance of an appeal is not jurisdictional, but merely a procedural irregularity. The case of *State of California, Department of Employment v. Fred S. Renauld & Co.* (January 12, 1950), 179 Fed. (2d) 605, involved a claim by the State of California for unemployment insurance contribution involving less than $500.00. Appeal was taken by Notice of Appeal filed in the District Court. Under Section 24 (a) of the Bankruptcy Act when an order, decree or judgment involves less than $500.00, an appeal therefrom may be taken only upon allowance of the Appellate Court. Appellant did not secure or petition for leave to

appeal. However, the Court was moved to consider the Notice of Appeal filed in the trial Court as an informal substitute for the application to the Court of Appeals even in this case involving less than $500.00. The Court held that the appeal would be considered on its merits notwithstanding the failure of petitioner to apply for leave to appeal as required by the Bankruptcy Act. The Court stated as follows:

> "Until *Reconstruction Finance Corp. v. Prudence Securities Advisory Group,* 1941, 311 U.S. 579, 61 S. Ct. 331, 85 L. Ed. 364, the tenor of the U. S. Supreme Court decisions in the matter of permissive appeals indicated lack of jurisdiction in the U. S. Circuit Court of Appeals (now U. S. Court of Appeals) to entertain an attempted appeal in the circumstances obtaining here (citing cases). In the *Reconstruction Finance Corp. (supra),* it was said concerning a provision (Sec. 250) of the Bankruptcy Act similar in requiring allowance of appeal by the Appellate Court . . . Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a Notice of Appeal in the District Court as insufficient. But the defect is not jurisdictional in the sense that it deprives the Court of power to allow the appeal. The Court has discretion, where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice . . . The failure to comply with statutory requirements . . . is not necessarily a jurisdictional defect".

It is apparent from the cases cited that the failure of Appellant in this case to obtain leave to file an appeal is not a jurisdictional defect, and that this

Court may disregard this procedural irregularity and hear this appeal on its merits.

Appellant urges this Court to exercise its discretion in this regard in view of the exceptional circumstances presented in this case. This case presents to this Court questions which are vital to the administration of the Bankruptcy Act in this jurisdiction. The numerous questions presented by this appeal are detailed in the extensive briefs filed by both parties, and in the Statement of Points Which Appellant Intends to Rely on Appeal. (Tr. 103-109.) Some of the more important and critical questions raised by this appeal are the following:

(1) Is the law of implied in fact and quasi contract applicable in bankruptcy proceedings, and does the conduct of the Trustee in accepting beneficial services requested by the Trustee create an implied in fact or quasi contract which is binding upon the bankrupt estate?

(2) Would denial of compensation to Appellant in this case constitute unjust enrichment to the bankrupt estate at the expense of Appellant?

(3) Should the conduct of the Trustee and his attorney in previously paying a real estate brokers commission under identical circumstances and in assuring Appellant that he would be paid for his services in this transaction estop the bankrupt estate?

(4) As a matter of justice and equity should appellant be paid for his services when his services saved this corporation and when he put together

the sale which resulted in the creditors and stockholders being paid in full?

(5) Can a real estate broker who has been requested to render services in a reorganization proceeding and who has not acted officiously be considered a volunteer and denied any compensation on that ground?

(6) Is a real estate broker one of the classes of persons entitled to compensation under Section 241 to 250 of the Bankruptcy Act (11 U.S.C.A. Sections 641-650)?

(7) Is the California statute of frauds (Code of Civil Procedure Section 1973) and the California case law of finders contracts applicable in a bankruptcy proceeding?

(8) Does assistance in the negotiation of resales constitute a conflict of interest by a real estate broker representing seller where such resales were essential in order to obtain an offer from a prospective purchaser for his client's property?

(9) Should the clear equitable principles applied in the case of *Berman v. Palmetto Apartment Corp.*, 153 Fed. (2d) 192 resulting in an award of compensation to a real estate broker under a very similar factual situation be applied in this case?

It is submitted that under these circumstances the Court should proceed to determine this case on its merits. The cases are clear that the failure to file a petition for leave to appeal is not jurisdictional, and

that the Court may disregard the procedural irregularity or may consider the Notice of Appeal as an informal application for leave to appeal and grant this informal application. The appeal has been filed in good faith, and has been fully argued in the Briefs and is now before the Court for decision. The appeal is meritorious and presents important questions of law and equity affecting the administration of the Bankruptcy Act. Appellant is appealing to equity for reasonable compensation for services rendered which saved this corporation in these reorganization proceedings, and this equitable appeal should not be denied on such technical grounds. In the interest of substantial justice and to prevent unmerited hardship to Appellant the Court should exercise the discretion vested in it to determine the merits of this case. As is stated in Rule 61, *Federal Rules of Civil Procedure:*

> "The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

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**II. APPELLANT PERFORMED SPECIALIZED SERVICES AS A REAL ESTATE BROKER AT THE REQUEST OF THE TRUSTEE, AND HE WAS NOT A VOLUNTEER.**

The next contention of the Trustee is that Appellant is a volunteer, and is therefore not entitled to compensation from Debtor's estate.

A volunteer is generally considered to be a person who officiously confers a benefit upon another with-

out a request for his services and without any express or implied promise of remuneration. (Restatement of Restitution, Section 2 and Section 112.) There is no evidence in this case that Appellant was a volunteer. The evidence is that Appellant proceeded with the sale of these assets at the request of the Trustee and his attorney and with the full knowledge, cooperation and acquiescence of the Trustee. Appellant was instructed and authorized by the Trustee and his attorney to proceed with the sale of the assets of the Debtor corporation. Appellant had many conversations with the Trustee in regard to this sale, and made various oral and written reports to the Trustee at his request in regard to potential purchasers he had contacted. The conduct of the Trustee in this matter, the payment of a commission to Appellant under identical circumstances upon the sale of certain contracts to Mr. Nielson, and the services rendered by Appellant in procuring a purchaser for the balance of the assets who was accepted by the Trustee, all demonstrate authority to proceed and a justifiable belief by Appellant that he would be paid. When a purchaser was produced by Appellant, the Trustee, and all other parties in interest, accepted the purchaser and the benefit of Appellant's services; proposed a plan of reorganization based upon the sale of the assets to this purchaser; had the plan accepted by the Court, and thereby ratified and confirmed all that Appellant had done in the administration of this estate. All of these facts conclusively demonstrate that Appellant was not a mere volunteer in this matter.

It has been suggested that the term "volunteer" is used in bankruptcy to indicate persons whose assistance to the Trustee or the bankrupt estate result in a duplication of services and of claims for compensation. (3 *Colliers* 14th Ed. p. 1426.) This was the definition apparently used by the Court in the case of *Gold v. Southside Trust Co.,* 179 Fed. 210, which is heavily relied upon by the Trustee and which was cited by the District Court as authority for its decision. That case was decided in 1910 and involved a real estate broker who had been invited and encouraged by the Trustee in Bankruptcy to sell certain property with the warning that no commission would be paid by the bankrupt estate. The Lower Court in that case had refused to pay a commission on the grounds that bankrupt property is always for sale; that the sale of the property was the duty of the Trustee; and that the Trustee had no authority to employ assistance without prior Court authorization. The Circuit Court by a two to one decision affirmed the Lower Court stating that the broker "was not only a volunteer, but a volunteer with warning".

This decision of the Court in this *Gold* case is criticized in 3 *Colliers on Bankruptcy,* 14th Ed. 1462-1463, where it is stated that the better view is probably expressed in the dissenting opinion as follows:

> "For obvious reasons sales by public auction are in theory the most desirable method of reducing a bankrupt estate to money. In practice, however, especially when the property has no ready market, a private sale through reliable and effi-

cient brokers or agents may be considerably more advantageous. Its extra cost frequently pays and Courts in appropriate cases should not allow themselves to be misled by the theoretical principle that a bankrupt estate is always for sale, and, therefore, needs nobody to assist the Trustee in detecting the highest bidders among potential purchasers. The case of *Gold v. Southside Trust Co.* offers a striking example . . . The Circuit Court of Appeals, however, held that the broker, thus selected by the Trustee, 'was not only a volunteer, but a volunteer with warning' because he had failed to apply to the Court for approval before rendering his services, although the Trustee had called his attention to the necessity of such approval. . . . The better view of this case is probably the dissenting opinion of Judge Archbald, who posits the problem under an aspect that continues to be of interest."

The opinion of Judge Archbald is particularly in point in this matter. A portion of his opinion is as follows:

"This is not, in my judgment, a matter of discretion. The petitioner has a valid claim against the bankrupt's estate for services performed as a duly licensed real estate broker, undertaken at the instance of the Trustee, by which the estate was materially benefited; and the Court was bound to recognize and allow it . . . If this was a case between individual parties, there would be no question as to liability; and the bankruptcy Court ought to be as ready and as much bound to recognize its obligations as an individual. *The petitioner was not a volunteer.* He acted by direct

solicitation, the Trustee seeking to avail itself of the facilities of the brokerage business in which he was engaged; and his efforts were most successful. . . .

"The reasons given by the Referee for rejecting the claim are far from satisfactory. He seems mainly to rely on the policy which he has adopted, and the rule which he has laid down in pursuance of it, by which he requires Trustees to get authority in advance when the assistance of brokers is desired in making sales of real estate. No doubt, the rule, as a rule, is a good one, and may properly be invoked to protect bankruptcy estates against inroads, to which they might otherwise be open. But judgment, after all, is to be exercised, and the rule is not to be applied indiscriminately to throw out claims of merit. A policy is not to be pursued as a hard and fast rule where it works injustice. It seems to be implied by the Referee that, as Trustees are the agents designated by the law to make sale of real estate, they are themselves to hunt up purchasers; but they are entitled to the assistance of counsel to guide them legally, and may employ an auctioneer to cry their sales without question; and why, then, may they not avail themselves in a proper case of the experience of real estate men to help dispose to advantage of the property? They certainly are not called upon to drum up bidders; and if they are not to be allowed to get such assistance, bankruptcy estates are likely to suffer, as would have been the case in this instance, rather than the opposite. Even, therefore, on the basis that the allowance of this claim is discretionary, the Referee has practically refused to exercise his judgment with regard to it,

> disposing of it on immaterial issues, rather than a consideration of the merits".
>
> "To affirm this decree, in my judgment, would work an injustice in order to support a policy, and I therefore dissent from it".

Appellant submits that the dissenting opinion of Judge Archbald in the *Gold* case presents the more realistic and the proper approach to this problem. It is apparent that the principles expressed in this dissenting opinion are the same principles that guided the Court in the allowance of a real estate commission to Mr. Berman under very similar circumstances in the more recent case of *Berman v. Palmetto Apartments Corp.,* 153 Fed. (2d) 192 (1946; C.C.A. 6 Michigan). It is the equitable principles expressed in this dissenting opinion and in the *Berman* case *(supra)* which Appellant submits should be followed by the Court in this case.

The specialized services rendered by Appellant in this matter are not services which should or could have been performed by the Trustee or his attorney. Appellant for many years has specialized in the sale of timber and timber lands. (Tr. 133.) Appellant for this additional reason should not be considered a volunteer.

The Trustee also cites in his brief the case *In re Prudence Bond Corporation,* 122 Fed. (2d) 258, in support of his contention that Appellant was a volunteer. It should be noted that this case holds that acts of a volunteer which were beneficial to the debtor's trustee may be validated by ratification, in which

case the party originally acting as the volunteer may be entitled to an allowance for his services. This is, of course, the situation in this case where the acceptance of the purchaser by the Trustee, and the acceptance of the services rendered by Appellant which were of great benefit to the estate, constitutes a ratification of these services.

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### III. PRIOR AUTHORIZATION IS NOT REQUIRED IN BANKRUPTCY PROCEEDINGS WHERE COMPENSATION IS BASED ON BENEFIT TO THE ESTATE.

This point has already been discussed and the cases cited in Appellant's Opening Brief, pages 57-59.

This question of prior authorization discussed by Trustee in his brief was also raised by the Respondent in the case of *Berman v. Palmetto Apartments Corp. supra,* 153 Fed. (2d) 192, and in that case this point was decided directly contrary to the contention of the Trustee in this matter. In the *Berman* case *(supra)* the Court had not authorized the agent to proceed, and had not fixed his compensation, and it was on this basis that the District Court refused the allowance of compensation. In reviewing this decision the Circuit Court states at page 193 of the reported case as follows:

> "The District Court denied his petition altogether. The Court filed an opinion which contained a finding that there was no valid existing contract between Appellant and the Trustee for the payment of a commission to Appellant. Conceivably, this may be true because the contract

> never had the sanction or approval of the Court, but we are not limited to the consideration of the strict legal rights of the parties. (Citing cases)."
>
> "Appellant's case cuts deeper than this. The District Court was sitting in bankruptcy and under the Bankruptcy Act had equitable jurisdiction. ... The original offer, the withdrawal of it, and the subsequent offer, confirmed by the Court, were phases of a continuing transaction which resulted in the sale and in which Appellant certainly had equitable if not legal right, since at the behest of the Trustee, and after diligent effort, he found a purchaser."

The Court in the *Berman* case refused to be bound by the strict legal construction of the District Court, and proceeded on equitable grounds to award an allowance for the reasonable value of services rendered which benefited the estate, in spite of the fact no prior authorization to proceed had been obtained from the Court. Similarly in many of the cases cited by Appellant, as well as in many of the cases cited by the Trustee, compensation was awarded to expert witnesses, analysts, consultants, real estate brokers and other agents who rendered services of benefit to the estate without any discussion or mention of prior authorization by the Court. (See *In re Building Development Co.,* 98 Fed. (2d) 844; *In re Industrial Machine & Supply Co.,* 112 Fed. Sup. 261.)

As an example, one of the cases cited by Trustee in support of his contention is the case of *In re Equitable Office Building Corporation,* 83 Fed. Sup. 531. This case holds the exact opposite of the

contention of the Trustee. The Court in that case, after pointing out that the real estate broker had no authority or approval of the Court to proceed, did actually award compensation to the broker in the sum of $10,000.00 as the reasonable value of services rendered to the estate by the broker. The Court states at page 580 of the reported case, after refusing the broker his full commission:

> "Nevertheless, it is possible that Mr. Langua, as has been suggested by Mr. Duncan, performed some services that tended to facilitate the final consummation of the mortgage transaction, and at a period when time was of the essence. Upon the assumption that this was the fact, I shall award him the sum of $10,000.00".

The Court in the *Equitable* case did award a reasonable compensation for services rendered by the broker in the administration of the estate after acknowledging and pointing out that the broker had no prior authorization or approval from the Court. Many of the other awards to consultants, experts and witnesses in this particular case are also worthy of note in supporting Appellant's position that prior authorization is not required by the cases where petitioner has rendered services of benefit to the estate.

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**IV. THERE IS NO EVIDENCE TO SUPPORT TRUSTEE'S CONTENTION THAT THERE WAS AN AGREEMENT THAT NO COMPENSATION WOULD BE PAID.**

Appellant has already discussed under Statement of the Case II-B the facts of this case in regard to

the understanding between Appellant and the Trustee, and in regard to the Trustee's request that Appellant sell the assets of this estate. There is evidence that during the course of Appellant's negotiations with the Trustee for the sale of both the timber cutting contracts and the Garcia tract that the Trustee advised Appellant that he should obtain his compensation from the buyer, and that the estate would not be responsible for his commission. Appellant admits that conversations were held with the Trustee during this time in the course of which he was advised that he should look to the buyer for his commission. However Appellant stated during these same conversations that this was impossible; that the seller always paid the real estate commission and not the buyer; that he didn't think it was possible to get his commission from the buyer; but that he would try to do so. There was never any agreement between Appellant and the Trustee that Appellant would look to the buyer for his commission. (Tr. 137.) In spite of these conversations wherein Appellant told the Trustee that he didn't think it was possible to get his commission from the buyer, the Trustee continued to urge Appellant to sell these assets. (Tr. 273.) Appellant had been paid his commission by the bankrupt estate in the Nielson transaction after identical conversations in regards to commissions. (Tr. 272.) During this same period Sterling Carr, the attorney for the Trustee, told Appellant not to worry because he would be paid if he sold these assets. (Tr. 273.) After Appellant had procured a purchaser, the Trustee negotiated directly

with the purchaser outside of the presence of Appellant, without his knowledge, and without making any provisions for compensating Appellant. (Tr. 320; Tr. 407.) The Trustee thereby made it impossible for Appellant to obtain his compensation from the buyer as he had previously suggested. During all of this time the Trustee knew that the buyer did not intend to pay any commission or compensation to Appellant. (Tr. 179-180; 159.) It is clear under both the law of implied in fact contract and the law of quasi contract as discussed in Appellant's Opening Brief that under these circumstances an obligation to pay reasonable compensation for Appellant's services arises as a result of the acceptance of these beneficial services irrespective of any prior conversation that may have occurred between Appellant and the Trustee.

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### V. THERE IS NO EVIDENCE THAT APPELLANT REPRESENTED CONFLICTING INTERESTS.

The facts in regard to the alleged conflict of interests are discussed under the Statement of the Case II-D above. It is clear from these facts that the principal factor which enabled the Appellant to obtain an offer for these assets from the Sugarman interests was his assistance in negotiating the resale of these assets by Sugarman to various other persons. Finding 13 in the Lower Court was as follows (Tr. 97):

> "Petitioner was instrumental in negotiating the resale by Sugarman Lumber Company, and Sugarman Lumber Company would not have offered to purchase the assets of debtor as aforesaid un-

less these resales had been negotiated by petitioner".

The Trustee now contends that these activities by Appellant constituted a conflict of interest. It is submitted, however, that the activities of the broker in endeavoring to place his potential purchaser in a position where an offer can be made do not constitute a conflict of interest, but represents diligent and conscientious effort on behalf of his client to obtain a purchaser for his property.

It is generally conceded that a broker necessarily must deal with both parties in the very nature of his business, and that his effort is to bring the parties together upon the terms outlined by the owner. (*Frank Meline Co. v. Klienberger,* 108 Cal.App. 600, 290 Pac. 1042.)

Appellant had suggested to the Trustee that the assets of this estate should be sold piecemeal as they were on the resale, but Appellant had been instructed by the Trustee that all of these assets must be sold at the same time for a total sum of approximately $4,000,000.00. (Tr. 252; Tr. 254.) An offer could not have been obtained for the purchase of these assets without some assistance to a potential purchaser in arranging the financing necessary to consummate a sale of this size. Efforts of a broker in attempting to arrange financing for a potential purchaser do not constitute a conflict of interests. It has been held that even the loan of money by the broker to a purchaser in order for him to complete the transaction does not constitute a conflict of interests. In this case of *Moody*

*v. Osborne,* 120 Cal. App. (2d) 598, 261 Pac. (2d) 183, the Court stated that the source of the funds with which such payment was made was of no particular import so far as the seller was concerned. Similarly, in the case of *Hicks v. Wilson,* 197 Cal. 269, 240 Pac. 289, the Court stated as follows:

> "It is common knowledge that real estate brokers make a practice of procuring necessary funds to complete a purchase of property in the sale of which they are interested, and that they receive and are entitled to receive compensation from the buyer for such service; but, as pointed out above, such service is quite distinct from those rendered to the seller in the sale of his property".

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**VI. APPELLANT'S PETITION FOR COMPENSATION WAS MADE AT THE EARLIEST POSSIBLE TIME.**

The Trustee in his brief attempts to make much of the fact that Appellant did not file his petition in this matter until after the sale to Sugarman Lumber Company had been completed and approved by the Court. It seems apparent that Appellant had no claim for compensation until the sale to his client had been completed and approved by the Court by its order of March 16, 1954. Appellant had no claim until the sale had been consummated by this order, and until the Trustee had wrongfully refused to pay or petition for a commission for his services rendered in procuring this purchaser to whom these assets were sold. It should be recalled that the final confirmation of this sale to Sugarman Lumber Company was most un-

certain until the last moment, and was attended by Temporary Restraining Orders and other motions by objecting shareholders. It seems difficult to see how Appellant could have asserted any claim in this reorganization proceeding any sooner than he did. His claim was filed as an administrative expense and set for hearing along with all other administrative expenses including the Trustee's fee and the various attorney's fees.

Appellant had also been advised by Mr. Sterling Carr, attorney for the Trustee, that he should go along exactly as he had been doing and not to say anything about his compensation. This statement by Mr. Carr appearing on page 287 of the Transcript stands uncontradicted and must be taken as completely true and accurate:

> Mr. Carr said, "I was never so shocked in all my life, I can't believe it, I can't believe that this is true". He said, "Alex, you go along just exactly the way you are going, don't say anything about it because if Mr. Stevenot is going to treat you that way after you have raised all this money and sold this property, then the only thing you can do is seek refuge with the Court, because, after all, Mr. Stevenot hasn't any legal right to give you a contract, Mr. Stevenot hasn't any legal right to set your fee, and you go right along, because you have been honest in this thing, and you have worked hard, and we needed this money so badly, and when the deal is closed, if he still doesn't pay you and you sue for it you can feel perfectly safe that the Courts of this state will treat you justly."

VII. THE CALIFORNIA STATUTE OF FRAUD IS NOT APPLICABLE IN THIS BANKRUPTCY PROCEEDING.

This is not a suit to recover a real estate broker's commission which has been agreed upon in writing by the parties, but is a petition to recover the reasonable value of services which have been rendered to the Debtor's estate in a reorganization proceeding at the request of the Trustee. The recognized commission of real estate brokers on a sale of timber land is 5% of the total sales price. (Tr. 147; Tr. 332.) This evidence has been introduced to establish not any agreed price but as a basis for determining the reasonable value of these services rendered by Mr. Wilson in procuring a purchaser for the assets of Coastal Plywood Company.

This claim of Appellant arises out of the conduct of the administration of the Debtor's estate during the course of these reorganization proceedings. It is Appellant's contention that on such an application under Sections 241, 242 and 243 of the Bankruptcy Act there is no requirement that the request to render such services or the employment of the broker be in writing. The Trustee cites no applicable cases to the contrary.

It is submitted that the California Statute of Fraud has no application in a federal court proceeding under the Bankruptcy Act where the powers granted to the federal court are derived from the federal statutes. Even in diversity of citizenship cases the Statutes of Fraud has been held to be procedural in California. (11 *Cal. Jur.* (2d) 195; *Woolley v. Bishop,* 180 Fed.

(2d) 188), and therefore not applicable in such federal court proceedings. There is no requirement that the federal court apply procedural rules even in diversity of citizenship cases. The case at bar is not a diversity of citizenship case. This case arises under the Bankruptcy Act, a federal statute, and there is even less justification for the application of a State procedural rule in this action than in a diversity of citizenship case.

It is submitted that the State law cannot bind the federal court while exercising its power under federal statutes such as the Bankruptcy Act. In this situation the court determines its power to award compensation to a real estate broker for services rendered by the wording of the federal statutes as enacted, and not by any State law. In this case Sections 241, 242 and 243 of the Bankruptcy Act gives the court power to allow reasonable compensation for services rendered in the administration of the estate which are of benefit to the estate. The Bankruptcy Act does not require that a contract to render such services be in writing.

The case of *Berman v. Palmetto Apartments Corporation,* 153 Fed. (2d) 192 *(supra)* is again on point. This case demonstrate that the state Statute of Frauds has no application in a federal court proceedings under the Bankruptcy Act. The State of Michigan, the state in which the federal court was sitting in the *Berman* case, has exactly the same statute of frauds provision as does the State of California in regard to agreements to employ real estate brokers. (Volume 3 Compiled Laws of Michigan, Section 566.132.) In

the *Berman* case sitting in Michigan with this statute of frauds provision the federal court proceeding under the Bankruptcy Act allowed a reasonable compensation to a real estate broker who did not have a written agreement with the Trustee to pay any commission. The same factual situation is present in this case, and the same rules should be applied.

The Trustee in his brief on page 55 cites the case of *Vanston Bondholders Protective Committee v. Green,* 67 S. Ct. 237, 329 U.S. 156 for the proposition that this State law is applicable in bankruptcy proceedings. However, in that case the Court clearly differentiates the type of claim involved in that case from the claim of Appellant in this matter which arises out of the administration of the estate. The Court states at page 169 of U. S. Reports:

> "The business of bankruptcy administration is to determine how existing debts can be satisfied out of the bankruptcy estate so as to deal fairly with the various creditors. The existence of a debt between the parties to an alleged creditor-debtor relationship is independent of bankruptcy and precedes it. The parties are in a bankruptcy Court with their rights and duties established, *except insofar as they subsequently arise during the course of bankruptcy administration or as a part of its conduct.* (Emphasis added)".

The Court thereby clearly distinguishes the claim which it had before it in that case which was an existing debt created under State law, and the claim presented by Appellant in this matter which arises out of the administration of the bankrupt's estate and

which is created by the bankruptcy act itself and controlled by federal law.

The Court makes it equally clear in the *Vanston* case *(supra)* that the State law has absolutely no control over the federal court in its administration of the Bankruptcy Act. The Court at page 162 of U.S. Reports states as follows:

> "In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. Erie v. Tompkins, 304 U.S. 64 has no application. That case decided that a Federal District Court acquiring jurisdiction because of diversity of citizenship should adjudicate controversies as if it were only another State Court. See Holmberg v. Ambrecht, 327 U.S. 392. *But Bankruptcy Courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with the authority granted by Congress to determine how and what claims shall be allowed under equitable principles.* (Heiser v. Woodruff, 327 U.S. 726, 732; American Security Co. v. Sampsell, 327 U.S. 269, 272; Pepper v. Litton, 308 U.S. 295, 303-306)".

This is exactly in accord with Appellant's contention and in accord with the action of the federal court in the *Berman* case *(supra)*. In the *Berman* case the claim of the real estate broker for reasonable compensation for services rendered was allowed in spite of the fact that the State of Michigan has exactly the same Statute of Fraud provision as does the State of California.

There is no requirement in the Bankruptcy Act that the claim of a real estate broker for reasonable compensation for services rendered the bankrupt estate be based upon a written contract authorizing him to proceed. The wording of the applicable sections makes no such requirement, and the federal court has not interpreted these sections of the Bankruptcy Act as requiring any written memorandum upon which to base a claim. The contention of the Trustee in attempting to make California law applicable to this claim, and in attempting to read a requirement of a written contract into the applicable provisions of the bankruptcy act cannot be sustained.

Even if the California statute was applicable in this proceeding, Appellant submits that the Trustee is estopped to raise such a defense in view of the conduct of the Trustee and the debtor corporation in the payment of a real estate broker's commission to the Appellant for the sale of certain cutting contracts to Mr. Nielson under an identical situation. Appellant was paid a real estate broker's commission in that situation without prior authorization and without any written agreement. This conduct raises an estoppel to rely on the Statute of Fraud. (*Seymour v. Oelrichs,* 156 Cal. 782; *LeBlond v. Wolfe,* 83 Cal. App. (2d) 282—defendant estopped to rely on the Statute of Fraud where real estate broker has changed his position in reliance on oral promise of the defendant;) (*Karus v. Olney,* 80 Cal. 90, *Fleming v. Dolfin,* 214 Cal. 269; *Brenneman v. Lane,* 87 Cal. App. 414.) Appellant has changed his position and waived a commis-

sion in reliance on the conduct of the Trustee in the Nielson transaction. Trustee should not be allowed now for the first time to raise the Statute of Frauds as a defense after this prior conduct and after the acceptance of the full benefits of the sale procured by petitioner.

It should also be noted that a portion of the assets sold through the efforts of Appellant in this matter to the Sugarman interests were personal property. (Tr. 177.) The Statute of Frauds has no application to the sale of personal property. *(Meadows v. Clark,* 33 Cal. App. (2d) 24.)

In addition Appellant would like to point out to the Court the very recent case of *Palmer v. Wahler,* 133 Cal. App. (2d) 705, 285 Pac. (2d) 8. In that case plaintiff had been orally requested to find a purchaser for certain timber. Plaintiff did procure a buyer who, after some negotiation with the parties, caused a corporation formed by him to purchase the timber. Plaintiff did not handle or participate in the negotiations for the sale after he had found and introduced the buyer to the owner of the timber. Defendant urged that Plaintiff was not entitled to a commission because (1) the oral contract requesting Plaintiff to obtain a purchaser for these assets was invalid under the Statute of Frauds and (2) because Plaintiff failed to allege or prove that he was a duly licensed real estate broker.

The Appellate Court affirmed the Lower Court and held that the oral contract of the parties was a "finder's agreement" which required only that the plain-

tiff introduce a prospective purchaser of the property to the owner desiring to sell in order to entitle the plaintiff to compensation, and that neither the Statute of Frauds nor the real estate licensing acts are applicable to these "finder's agreements." (See also to the same effect *Heyn v. Phillip,* 37 Cal. 529; *Shaffer v. Beinhorn,* 190 Cal. 569, 213 Pac. 960; *McKenna v. Edwards,* 19 Cal. App. (2d) 327, 65 Pac. (2d) 810; *Crofoot v. Spivak,* 113 Cal. App. (2d) 146, 248 Pac. (2d) 45; *Freeman v. Jergins,* 125 Cal. App. (2d) 536, 271 Pac. (2d) 210.)

It is submitted that the request of the Trustee and his agent in this case that Appellant find a purchaser for the assets of this estate constitutes a finder's agreement as defined in these cases, and that this agreement is not within the purview of the California Statute of Frauds.

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## CONCLUSION.

Appellant has submitted to this Court a claim for compensation as a result of services rendered to the Trustee in a reorganization proceedings. These services were requested by the Trustee, were accepted by the Trustee, and were of great benefit to the bankrupt estate.

This equitable claim was denied in the Lower Court as a result of what Appellant contends to be an erroneous application of the law of quasi contract and the law of volunteers. It is submitted that the facts of this case should induce this Court under the law of quasi

contract and as a matter of justice and equity to impose an obligation on the Trustee to pay for the beneficial services rendered at his request and freely accepted by him. Appellant was not a volunteer in rendering these services because they were rendered at the request of the Trustee in a justifiable belief that Appellant would be paid, and because the services rendered were specialized services of a real estate broker which did not duplicate the services of the Trustee.

The Trustee has attempted to overcome this equitable claim for services on a number of technical grounds all of which have been discussed in the above brief and which have been shown to be inapplicable. These technical considerations should not be allowed to overcome this equitable claim. The Bankruptcy Court is a Court of equity, and its equitable powers should be exercised to see that substantial justice is done. As was stated in the case of *Pepper v. Litton,* 308 U.S. 275:

> "The Bankruptcy Courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates. They have been invoked to the end that fraud will not prevail, that substance will not give way to form, and that technical considerations will not prevent substantial justice from being done."

Appellant therefore submits that the decision of the lower Court should be reversed, that the case should

be decided on its merits, and that Appellant should be awarded reasonable compensation.

Dated, November 11, 1957.

Respectfully submitted,

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